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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 26

GEORGE W. McCANDLESS, as Receiver of DUQUESNE GAS CORPORATION,

Complainant,

against

MAXIME FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION,

Defendants.

PETITION FOR REHEARING ON BEHALF OF CHAUCER CORPORATION, ONE OF THE DEFENDANTS BELOW

JOAB H. BANTON,
Solicitor for Defendant, Chaucer Corporation.

SAMUEL I. HARTMAN,
CHARLES BALLON,
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To The Honorable Charles E. Hughes, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named defendant, Chaucer Corporation, by its solicitor, Joab H. Banton, presents this, its petition for a rehearing of the above-entitled cause insofar as the same involves and pertains to the Chaucer Corporation and insofar as a judgment has been awarded against said Chaucer Corporation in the sum of $425,000, with interest from June 6th, 1930.

Jurisdiction

The petition for certiorari in this cause was filed on April 18th, 1935, and certiorari was granted on May 13th, 1935. This Court rendered its decision on November 11th, 1935, reversing the judgment of the United States Circuit Court of Appeals for the Second Circuit and modifying its judgment in other respects including the award of judgment in the sum of $425,000, with interest from June 6th, 1930, against the defendant Chaucer Corporation as against whom the complaint was dismissed in the District Court, which was affirmed in the Court of Appeals.

Reasons for Petition for Rehearing

I.

There is not a scintilla of evidence in the record that Chaucer Corporation sold any stock of the Duquesne Gas Corporation nor that Chaucer Corporation received any money from any such transaction. The sole testimony at all relevant to this subject was that adduced through an accountant, one Roger A. McShea, Jr., plaintiff's witness. He testified in part as follows:

> "I also examined the books of the Byron and Kingston Corporation, as well as Furland & Company, *but I did not examine the books of Chaucer Corporation.*" (Italics ours.) (R. p. 95.)

Again at page 98 of the Record, Mr. McShea, desirous of clearly stating that he had no knowledge concerning Chaucer Corporation, testified:

"Of course, I did not see any books of any kind or any records as far as Chaucer were concerned." (Italics ours.)

Thereafter Witness McShea testified that he *assumed* that Chaucer Corporation sold 42,500 shares of Duquesne Gas Corporation. His exact testimony on *direct* examination follows:

"Q. I am asking you about Chaucer. I am asking you if you have got any information in these examinations relating to the matter of the sale by Chaucer? A. Of course, I have the contract, but I *believe* from that, that Chaucer sold the same number of shares in Bergen that Byron did.

Q. Were any statements made to you by Parisette or others to that effect? A. No, I don't believe so.

Q. Will you refresh your recollection by reading what I show you here? A. I just don't know what you mean, Mr. Royall.

Q. Have you read this, '85,000 shares sold to Bergen,' where did you get that from? A. *From my assumption*, in accordance with the contract, that Chaucer also sold 42,500 shares, *I worked this up on that assumption*, which was based upon the contract.

Q. You *assumed* that the contract was performed 50-50, as the contract on its face indicated it was intended to be? A. Yes, sir.

Q. And that upon that *assumption*, if it was performed 50-50, Chaucer sold another 42,500 shares to Bergen? A. That is right.

Mr. Hirshfield: I object to that ground of assumption.

Q. I mean that is the best you can testify to on that score? A. Yes." (Italics ours.) (R. pp. 99 and 100.)

The contract upon which the witness predicated his assumption is Plaintiff's Exhibit 31 and consists of a grant of an option to purchase Duquesne Gas Corporation common stock by Byron Corporation and Chaucer Corporation to one John J. Bergen. *This document is an option agreement, not a contract of purchase and sale.* No testimony was offered to show that Chaucer Corporation sold any Duquesne stock to Mr. Bergen or any one else. The lack of evidentiary strength and character in Witness McShea's testimony prompted counsel for plaintiff to ask him at the conclusion of this line of interrogation:

> "Q. I mean that is the best you can testify to on that score? A. Yes."

Mr. Justice Cardozo in referring to the Duquesne Gas Corporation stock in his opinion says:

> "Of the part belonging to Kingston, 85,000 shares were assigned to the Byron and Chaucer companies which sold them to the public through Bergen, a stock operator, for $850,000, $425,000 being paid to Byron and a like amount to Chaucer. What became of the other shares the record does not show." (80 Law. Ed. 74, at p. 78.)

It is respectfully submitted that the foregoing is an unwarranted assumption unsupported by the testimony in the case. Mr. John J. Bergen, referred to in the opinion, is a well known operator. It would have been easy for plaintiff to have put him on the stand and ascertain from whom he purchased his Duquesne stock holdings. It must be remembered that Furland & Company had 140,000 shares of Duquesne stock. So far as the record indicates there is

no more proof that Mr. Bergen consummated his purchase from Chaucer Corporation than from Furlaud & Company, Inc. The fact is that there is no direct evidence even that Mr. Bergen acquired any Duquesne stock at all. That the record is barren of evidence of a sale of Duquesne stock by Chaucer Corporation does not permit of contradiction.

II.

The Court's attention is respectfully directed to the fact that only 25% of the stock of Chaucer Corporation belonged to the wife of Carlos Reuter. The remaining 75% of Chaucer stock was owned by corporations as to which there isn't a single sentence of testimony in the record. The majority opinion of the Court however states that, "* * * Chaucer Corporation was closely related to Furlaud & Kingston, * * * the wife of Carlos Reuter (being) an important shareholder in Chaucer." (80 Law. Ed. 74, at p. 76.)

There is no evidence of any kind in this case that any of the stockholders of Chaucer Corporation were chargeable with any improper conduct or with knowledge of improper conduct unless the activity of Carlos Reuter is assumed to be improper and a presumption at law exists that his wife is charged with knowledge of her husband's acts. Carlos Reuter was not a stockholder of Chaucer Corporation; the record indicates only that Mrs. Reuter was a 25% stockholder. But such presumption does not exist,—on the contrary, the law presumes a wife to be innocent of any knowledge of her husband's improper conduct and the presumption to that effect must be overcome by affirmative evidence.

In *Gottlieb* v. *Thatcher*, 151 U. S. 271, this Court says:

> "The relationship of the parties does not, of and in itself, cast suspicion upon the transaction, or create such a prima facie presumption against its validity as would require the court to hold it to the invalid without proof that there was fraud on the part of the grantor, participated in by the grantee. This purpose is so well settled that authorities need not be cited in its support." (at p. 279.)

In the case of *Shultz* v. *Hoagland*, 85 N. Y. 464, the New York Court of Appeals says;

> "The relationship of assignor and assignee, and their intimacy and friendship, and the preference given to the latter as a creditor prove nothing by themselves. They are consistent with honesty and innocence and become only important when other circumstances indicative of fraud, invest them with a new character and purpose, and transform them from equivocal and ambiguous facts into positive facts badges of fraud." (at p. 468.)

Mrs. Reuter and other stockholders of Chaucer Corporation cannot be said then, to have had any knowledge of the alleged fraud. The Trial Court found as a fact that there was no such evidence. Such guilty knowledge can nowhere be found in the record and cannot be imputed to them at law.

This Court however has held herein that,

> "In view of the initial fraud the burden was on Kingston and Furlaud to show that Byron and Chaucer were purchasers in due course, and not agents and confederates wearing the cloak of purchasers. King v. Doane, 139 U. S. 166, 173, 35 L. ed.

84, 87, 11 S. Ct. 465; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 204, 205, 25 N. E. 402, 10 L. R. A. 676; Seymour v. McKinstry, 106 N. Y. 230, 240, 12 N. E. 348, 14 N. E. 94. We think that Byron and Chaucer were subject to an equal burden. Many suspicious circumstances point to guilty knowledge and justify a holding that the burden has not been borne." (80 Law. Ed. 74, at p. 84.)

In short, then, the theory upon which liability is imposed upon the Chaucer Corporation is that enunciated in the foregoing cases cited by Mr. Justice Cardozo in the majority opinion of the Court. Mr. Justice Harlan who wrote the opinion in the *Doane* case (*supra*), stated in part:

> "If the subscription and original note were obtained by fraud, these principles would determine this case adversely to Doane *unless he gave value for the original note without notice of the alleged fraud. Whether he did or did not give value, without such notice is the vital question in this case.* * * * *In the case supposed he must show that he paid value, that fact being established, he will be entitled to recover, unless it is proved that he purchased with actual notice of defect in the title, or in bad faith, implying guilty or wilful ignorance.* (Cases cited)." (at p. 173.) (Italics ours.)

The same rule is pronounced in the *Diefendorf* case (*supra*).

Applying this rule to the case at bar, it is respectfully urged that the complaint against Chaucer Corporation must be dismissed. It is apparent that value was paid by Chaucer Corporation for the Duquesne stock. This Court states in its majority opinion, "We are not unmindful of the con-

tention that the sale by Kingston (to Chaucer) was at the rate of 50 cents a share (which for 85,000 shares would amount to $42,500) * * *" (80 Law. Ed. 74, at p. 83). That this constituted full value cannot be questioned. The Court states in its opinion that "the Company (Duquesne Gas Corporation) became crippled and indeed insolvent at the outset of its business life." (80 Law. Ed. 74, at p. 80.) Certainly 50 cents per share of stock of an insolvent corporation is a good selling price. The record therefore shows no bad faith or knowledge of the alleged fraud in Chaucer Corporation and it further appears that said Chaucer paid full consideration for the shares of Duquesne stock purchased by it. Whatever burden may be imposed upon Chaucer Corporation, by virtue of the cases cited in this Court's opinion, has been amply sustained by it. Under the rule of the *Doane* case (*supra*), it is contended no judgment can be entered against the defendant Chaucer Corporation.

III

Assuming that Chaucer Corporation, in some esoteric manner not apparent in the record, has been shown to have been a party to or to have had knowledge of the alleged fraud, a cause of action against it does not lie in this complainant who is a receiver of the Duquesne Gas Corporation, the representative of the creditors of the corporation. In the *Doane* case (*supra*) the action was instituted by the *payee of a promissory note* against the maker. In the *Diefendorf* case (*supra*) the *plaintiff had purchased two promissory notes from the payee* thereof and instituted suit against the *maker*. In the third case cited by this Court in

its opinion, *Seymour* v. *McKinstry & Sabey*, 106 N. Y. 230, the action was instituted by a *vendor* of real estate to have an equitable lien declared in his favor for unpaid purchase money. In all cases the action was instituted by a party directly against the originator and creator of the instrument in question. The stockholders of Chaucer Corporation acquired their stock in Duquesne Gas Corporation long after it had been issued to Kingston. They paid for it an amount greatly in excess of its value to Duquesne or to any one else. There is no evidence that Chaucer sold any of the Duquesne stock, but even if it had and acquired a profit thereby, there is no contention that in effecting such supposed sale it made any representations of any kind to any one. Again, assuming that representations were made to induce the sale, then a cause of action might lie in such purchasers,—not in the receiver of the Duquesne Gas Corporation. The effect of this decision gives to the Receiver of Duquesne the right to recover sums that could never have been justly due it, at the expense of those to whom those sums were due. The District Court dismissed the complaint against the Chaucer Corporation and in connection therewith Mr. Justice Knox stated in his opinion:

> "However much the persons who subsequently purchased stock from Byron and Chaucer Corporations may have been injured, it does not seem that the receiver can recover on behalf of Dusquesne Gas Corporation under the doctrine announced in the case of the Old Dominion Copper Company v. Lwisohn, 210 U. S. 206. Nor can he recover, as in the case of the bonds and notes, on the theory that the money paid in by purchasers of stock became impressed with a trust in favor of the corporation. This is so for the reason that the evidence does not

show that any representation was made, by circulars or otherwise, that the money so received would be paid over to the Dusquesne Gas Corporation. The complaint therefore will be dismissed as against the defendants Byron Corporation and Chaucer Corporation."

For the reasons set forth hereinabove it is respectfully submitted that this petition for a rehearing be granted; that the judgment of the United States Circuit Court of Appeals for the Second Circuit be, upon further consideration, affirmed, and that the complaint herein be dismissed as against the defendant Chaucer Corporation.

Respectfully submitted,

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SAMUEL I. HARTMAN,
CHARLES BALLON,
Of Counsel.

Certificate of Counsel

I, Joab H. Banton, solicitor for defendant, Chaucer Corporation, certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JOAB H. BANTON,
Solicitor for Defendant,
Chaucer Corporation.